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No. 82-850

IN THE

Supreme Court of the United States

October Term, 1982

EDWIN F. GORDON,

Petitioner,

vs.

GEORGE F. TERRY, SR., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT FIRST NATIONAL BANK IN PALM BEACH IN OPPOSITION

JOHN F. RUDY, II of
BUSH, ROSS, GARDNER,
WARREN & RUDY
101 South Franklin Street
Tampa, Florida 33602
(813) 224-9255

Attorneys for Respondent
FIRST NATIONAL BANK
IN PALM BEACH

QUESTIONS PRESENTED FOR REVIEW

I

HAS THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT RENDERED A DECISION IN CONFLICT WITH A DECISION OF THIS COURT OR OF ANOTHER FEDERAL COURT OF APPEALS BY HOLDING:

A. In accordance with *SEC v. W. J. Howey Co.*, 328 U.S. 293 (1946) that the transactions in question were not "investment contracts" under the federal securities acts because they placed control over all significant decisions in the hands of Gordon and his co-investors, and

B. FNBPB's acts and statements did not raise an issue of dependency under the narrow exception of *Williamson v. Tucker*, 645 F.2d 404 (5th Cir. 1981).

LIST OF ALL THE PARTIES

The Petition arises from five separate cases brought in the district court:

1. *Edwin F. Gordon v. George A. Terry, Sr., Mary A. Terry, George A. Terry, Jr., Netsy B. Perry, E. G. Green, Gustave T. Broberg, Jr., First National Bank in Palm Beach, Hemingway Corporation, T. R. Anderson, Robert D. Lacey, Pierre V. Heftler and William Rudkin* (U.S. Dist. Ct. No. 76-8151 Civ-CA; Appeal No. 80-5797).

2. *Edwin F. Gordon v. Estate of M. M. Overstreet, Jeanette Overstreet, Jennings L. Overstreet, Jo Ann Overstreet, E. G. Green, Gustave T. Broberg, Jr., Hemingway Corporation, T. R. Anderson, Robert D. Lacey, Pierre V. Heftler and William Rudkin* (U.S. Dist. Ct. No. 76-8152, Civ-CA; Appeal No. 80-5798).

3. *Edwin F. Gordon v. E. G. Green, Gustave T. Broberg, Jr., Alice H. Rhoades, George L. Coleman, Dudley V. Sutphin, Harold F. Heye, Samuel R. Sutphin, Pierre V. Heftler, William Rudkin, George M. Barley, Jr., and Hemingway Corporation* (U.S. District Ct. No. 76-8153 Civ.-CA; Appeal No. 80-5799).

4. *Edwin F. Gordon v. Hobe Properties, Inc., Hobe Jupiter Properties, Inc., Hobe Sound in Estates, Inc., E. G. Green, Gustave T. Broberg, Jr., Hemingway Corporation, T. R. Anderson, Robert D. Lacey, Pierre V. Heftler and William Rudkin* (U.S. Dist. Ct. No. 76-8154, Civ-CA; Appeal No. 80-5800).

5. *Edwin F. Gordon v. William Hersey Hamm, III, Edward Hersey Hamn, E. G. Green, Gustave T. Broberg, Jr., Hemingway Corporation, T. R. Anderson, Robert D. Lacey, Pierre*

V. Heftler and William Rudkin (U.S. Dist. Ct. No. 76-8155 Civ-CA; Appeal No. 80-5801).

The United States District Court for the Southern District of Florida, in a single order, granted summary judgment to all defendants in all cases. The cases were thereafter consolidated for appeal before the United States Court of Appeals for the Eleventh Circuit. The circuit court reversed as to defendant E. G. Green, and affirmed the summary judgment as to the remaining defendants. The parties to this proceeding are all defendants named, other than E. G. Green.

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OPINIONS AND JUDGMENTS BELOW

The opinion of the Eleventh Circuit is reported at 684 F.2d 736 (11th Cir. 1982). The opinion of the United States District Court, Southern District of Florida is unreported, but reproduced in Petitioner's Appendix, Part "B", pp. 1b-62b.

JURISDICTION

Jurisdiction is invoked by Petitioner under 28 U.S.C. §1254(1).

STATUTES AND RULES INVOLVED

Securities Act of 1933, 12(1), 17(a), 15 U.S.C. 77l(1), 77q(a); Securities Exchange Act of 1934, §10(b), 15 U.S.C. §78j(b). The statutes referred to above are set forth in Petitioner's Appendix, Parts "H-J".

Rule 17, Revised Rules of the United States Supreme Court, 28 U.S.C.A.:

> .1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call

for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

.2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari.

DESIGNATIONS

The following designations are used throughout this brief:

Gordon	=	Edwin F. Gordon, Plaintiff/Appellant/Petitioner
Green	=	Elmer G. "E.G." Green, Defendant/Appellee
FNBPB	=	First National Bank in Palm Beach, Defendant/Appellee/Respondent
Broberg	=	Gustave T. Broberg, Jr., Defendant/Appellee/Respondent
Barley	=	George M. Barley, Jr., Defendant/Appellee/Respondent
R.	=	Record of Proceedings, Case Nos. 80-5797 - 80-5801, U.S. Dist. Ct. S.D. Fl.
Pet.Br.	=	Petitioner, Edwin F. Gordon's Brief

STATEMENT OF THE CASE

Course of Proceedings Below

Petitioner, Edwin F. Gordon ("Gordon") originally sued the various and numerous respondents in five separate actions filed in the United States District Court for the Southern District of New York. Shortly thereafter, Petitioner dismissed respondent, First National Bank in Palm Beach ("FNBPB") from each of the actions (R.61-62), and the cases were then transferred to the United States District Court for the Southern District of Florida, where they were dismissed for lack of jurisdiction under Rule 12(b), Fed.R.Civ.P. (R.1778).

On appeal, the United States Court of Appeals for the Fifth Circuit declined to reach the merits, finding instead that the pleadings were not "short and plain" and did not satisfy the requirements of Rule 8, Fed.R.Civ.P. The district court's judgment was vacated, and the cases remanded for dismissal of the complaint with the right for Gordon to file further complaints in compliance with Rule 8. *Gordon v. Green*, 602 F.2d 743 (5th Cir. 1979).

On remand, the first set of amended complaints was dismissed by the district court on Rule 8 grounds. Gordon added FNBPB to one of the cases (U.S.Dist.Ct., S.D. Fl., No. 76-8151 Civ-CA; on appeal 80-5797) by a third amended complaint alleging violations of various provisions of the federal securities laws (R.167)[1].

On the basis of the allegations, Gordon's affidavits, and the written agreements representing each real estate syndication, defendants moved for summary judgment, which was granted

1 Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b)(1976); Rule 10b-5, 17 C.F.R. §240.10b-5; Sections 5 and 12(1) of the Securities Act of 1933, 15 U.S.C. §§ 77e, 771(1)(1976); Section 17(a) of the Securities Act of 1933, 15 U.S.C. §77q(a)(1976); Section 206 of the Investment Advisors Act, 15 U.S.C. §80b-6(1976).

on the ground that no security was alleged (R.1778-82). On appeal, the five cases were consolidated, and the United States Court of Appeals for the Eleventh Circuit reversed the summary judgment as to defendant, E. G. Green ("Green"), and affirmed as to the remaining defendants. *Gordon v. Terry*, 684 F.2d 736 (11th Cir. 1982).

Statement of the Facts

Each of Gordon's suits arose from his purchase of a percentage participation in five real estate syndications in central Florida, four of which were governed by land title trust agreements, pursuant to Florida Statutes, §689.071 (1973),[2] and the fifth of which was governed by a limited partnership agreement (Pet. App. "B", pp. 16b-17b).

Gordon's suit against this respondent, FNBPB, pertained to a large tract of real property known as the "Magnolia Ranch." (Pet. App. "B", p. 14b). Pursuant to the terms of a written trust agreement, FNBPB was a passive trustee, subject to the control and direction by a majority of the participants ("Beneficiaries").[3] Gordon owned a 40 percent beneficial interest in the syndication (R.1782-83). The opinion of the Eleventh Circuit concisely summarizes the relationship of the parties and the operation of, and reason for, this and the other ventures. *Gordon v. Terry, supra* at 740, 742.

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2 Florida Statutes §689.071 (1973) specifically authorizes land trusts which were originally known as "dry," "passive" or "Illinois Land Trusts." *Ferraro v. Parker*, 229 So.2d 621 (Fla.App. 1969). While the Florida Legislature thus encouraged investment in Florida real estate by giving investors their desired anonymity, it also provided a vehicle whereby, although the beneficiaries were the real owners, a trustee's deed to a subsequent purchaser (pursuant to direction by the anonymous beneficiaries) would be unassailable. Florida Statutes, §689.071(2).

3 The Trust Agreement pertaining to the Magnolia Ranch transaction provided in pertinent part:

> . . . [I]n transacting any business relative to the property, especially in selling the same and determining the terms under which the sale of said property will be made, the Trustee shall be governed and controlled by a majority consent of the Beneficiaries in accordance with their percentage of ownership, and all parties hereto shall be bound and controlled by such decision. (R. 1783).

The district court entered summary judgment for all defendants, and the circuit court affirmed as to all defendants, except E. G. Green, on the allegations as supported by Gordon's affidavits viewed in a light most favorable to him. The circuit court *did not* hold that the investments by Gordon constituted securities. Rather, it held that as to Green:

> . . . Gordon has set forth specific statements made by Green which, if proven, demonstrate that Green represented himself to have unique knowledge regarding the real estate market in central Florida and the contacts and expertise to structure highly profitable deals. *id.* at 743.
>
> * * *
>
> In selecting the federal securities acts as a means to obtain redress, Gordon has chosen a most difficult route. On remand he will be faced with the burden of proving that his dependency on Green rendered him incapable of exercising the powers the written agreements vested in him. His path would have been much simpler in a state court. *id.* at 744.

As to FNBPB (and, Broberg and Barley), the circuit court wrote:

> . . . Gordon's assertions demonstrate that the Bank and Broberg had confidence in Green's expertise, that they assured Gordon his investments were in good hands, and that they claimed to be skilled in their respective occupations. Last, we are told that all three defendants agreed to manage the syndications.
>
> * * *
>
> Gordon does not contend that the three defendants possessed unique knowledge or skills, nor does he set forth facts from which we could infer such expertise. *id.* at 743.

As to FNBPB (and Broberg and Barley) the circuit court held: "[Gordon] does not have a securities claim." *id.* at 744.

SUMMARY OF THE ARGUMENT

Gordon's arguments do not raise special and important reasons for issuing a writ of certiorari to the circuit court, as required by Rule 17, Revised Rules of the United States Supreme Court. Conflict jurisdiction simply does not exist because, contrary to Gordon's representations, the circuit court did not find that record facts established that his investment was or could be a "security". The circuit court specifically held that Gordon's investment was certainly not a security, because the subject written agreements placed control over all significant decisions in him and his fellow co-investors; however, as to Green only, Gordon is to be allowed to return to the trial (district) court in order to pursue the almost impossible task of proving that his so-called dependency on Green rendered him incapable of exercising the powers that the written agreements vested in him.

The circuit court did not hold that FNBPB could or could not be liable as a "collateral participant" within the narrow dependency exception of *Williamson v. Tucker*, 645 F.2d 404 (5th Cir). Gordon's attempt to create the false premise that the circuit court "held" that a "security" could be involved and then his leapfrogging to an argument based upon "collateral participation," without suggesting a conflict in decisions, demonstrates at the threshhold that there are no special and important reasons for issuing the writ.

ARGUMENT

I

PETITIONER HAS NOT DEMONSTRATED ANY BASIS FOR THE COURT'S EXERCISE OF ITS CONFLICT JURISDICTION.

In deciding whether there are "special and important reasons" for issuance of a writ of certiorari, this Court must ascertain whether the Eleventh Circuit decision below conflicts with the decision of another federal court of appeals on the same matter, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Gordon's position has consistently been that when he invested in the subject real estate syndication, he entered into an "investment contract" and thus a security under the federal securities laws.[4]

The decision of this Court in *SEC v. W. J. Howey Co.*, 328 U.S. 293 (1946) defined an "investment contract" as a "contract, transaction or scheme whereby a person [1] invests his money [2] in a common enterprise and [3] is led to expect profits solely from the efforts of the promoter or a third party." *id.* at 298-99.

Under the third element of the investment contract interpretation established in *Howey, id.*, the focus has been on the dependency of the investor on the entrepreneurial or managerial skills of a promoter or third party. *SEC v. Koscot Interplanetary, Inc.*, 497 F.2d 473 (5th Cir. 1974). If an investor has the ability to control his investment, and its profitability, either through his own efforts or by majority vote in a group venture, he is not dependent upon the skills of others, and there is no security. *Gordon v. Terry, supra*, at 741.

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4 An "investment contract" is a "security," 15 U.S.C. §§77b(1), 78c(a)(10) (1976).

The district court below determined that the third element of *Howey, supra,* was not present because, under the terms of the land title trust agreement entered into by Gordon, he and his co-investors retained control over all decisions which could or would affect the success of the venture.

After the district court entered its Order granting summary judgment, the United States Court of Appeals for the Fifth Circuit decided *Williamson v. Tucker, supra,* p. 6, a case in many respects analogous to this action. There, investors were participants in joint ventures in real estate, written agreements providing that any decision regarding the properties would be made by a majority vote of the holders. The *Williamson* court noted that there would be no security if "the power retained by the investors is a real one which they are in fact exercising." *id.* at 419. It then proceeded to articulate a narrow exception to the general rule set forth in the third element of *Howey, supra,* and recognized that under certain circumstances, a written agreement might not allow an investor to truly exercise the powers supposedly given. If so, he would be in a position of "dependency," there would not be any means of protecting his investment, and he would be forced to rely on others for his expected profits from the venture. One example given by the *Williamson* court, and seized upon by Gordon as falling within his allegations, was a dependency created by another's specialized expertise.

Here, in holding that, as to *all* of the defendants in the case, the investment contracts were not securities, the Eleventh Circuit found:

1. The written agreements were not securities because they placed control over all significant decisions in the hands of the investors, including Gordon.

2. However, as to Green, the person who created the land syndications and sold interests in them, Gordon

> had made allegations and given testimony (by affidavit) which now requires that the district court allow him to embark upon the "most difficult route" of attempting to prove that his dependency on Green's skills rendered him incapable of exercising the powers the written agreements vested in him. This is the narrow exception established in *Williamson v. Tucker, supra.*

The circuit court held that no security was involved because Gordon and his fellow investors had complete control over all significant decisions affecting the venture; but, in the event Gordon could possibly prove that his so-called "dependency" upon Green rendered him incapable of exercising the powers which he had by virtue of the written agreements, then a jury submissible issue might be presented.

The *Williamson v. Tucker, supra,* "dependency" exception does not create a "security" for purposes of the federal securities acts. It does no more than create a "narrow exception." Once a transaction is deemed not to be a "security," it is not magically transformed into a "security" merely because the investor was "dependent." The circuit court, commenting on *Williamson v. Tucker, supra,* wrote:

> The *[Williamson]* panel emphasized that when agreements provide investors with substantial control, a plaintiff claiming forced reliance on another is faced with a difficult burden of proof. "Such an investor must demonstrate that, in spite of the partnership form which the investment took, he was so dependent on the promoter or on a third party that he was in fact unable to exercise meaningful partnership powers." *Id.* at 742.

A careful reading of Gordon's brief eliminates any possible question that the Court should exercise jurisdiction here by issu-

ing a writ of certiorari. Gordon does not suggest that the circuit court's decision conflicts with this Court's decision in *SEC v. W. J. Howey Co., supra,* by claiming that the subject written agreements do indeed meet the *Howey* criteria for the definition of an "investment contract" or "security." Gordon does not attack the circuit court's conclusion that, because the written agreements in this case placed control over all significant decisions of the investors, the district court was correct in holding that no security is involved for purposes of the federal securities acts. Rather, he makes the misstatement that "The opinion below held that there are facts in the record which, if proved, would establish that the investment made by . . . Gordon . . . was a security." (Pet. Br. p. 9). To the contrary, the circuit court wrote at 684 F.2d 744:

> The allegations and affidavits in this case are sufficient to raise an issue only as to Gordon's dependency on Green's skills. The plaintiff may have common law and statutory claims against the remaining defendants, *but he does not have a securities claim.* In selecting the federal securities acts as a means to obtain redress, Gordon has chosen a most difficult route. On remand he will be faced with the burden of proving that his dependency on Green rendered him incapable of exercising the powers the written agreements vested in him. His path would have been more direct and much simpler in a state court. (Emphasis added).

Moreover, Gordon does not contend that the circuit court's decision conflicts with a prior decision of this Court or of any other federal circuit court in reference to *Williamson v. Tucker, supra.* As a matter of fact, Gordon cannot complain of the circuit court's application of the *Williamson* exception, because that decision constitutes his very narrow window for return to the district court in order to prove what appears to be the impossible. Quite obviously, Gordon will not be able to prove in the district court that Green's telling him that he had unique capabilities rendered him incapable of exercising the decision

making powers which he had under the agreement. However, the point here for purposes of conflict certiorari jurisdiction is whether there is indicated any conflict. Very simply, there is not, since the circuit court applied the established ("uncontroverted") facts to the law as articulated in *Howey*, *Koscot* and *Williamson*, *supra*.

Rather than address himself to the question which is required in order for this Court to consider jurisdiction, Gordon suggests "conflict" based upon what he conceives as a theory of "liability of collateral participants." (Pet. Br. p. 12). He then proceeds upon a false premise by claiming that the circuit court "lost its way," since, that court having established there could be a securities transaction involved, the next step should have been to follow the analytical method prescribed by cases Gordon cites in Part I of his argument to identify the participating miscreants,[5] a procedure he suggests is dictated by *Howey*, *supra*, at 298. (Pet. Br. p. 26).

What Gordon fails to accept is that the circuit court applied the *Howey* analysis (as he now suggests was proper), "that the determination first must be made whether an investment constitutes a security" (Pet. Br. p. 26), *and found that it did not*. Once having decided there was no security, but only an issue that precluded summary judgment as to Green, there was no reason for the circuit court to proceed further, and decide in a vacuum, whether there was a violation and who was liable therefore. Thus, neither in Gordon's brief nor in the circuit court's opinion is there any suggestion that either (a) the circuit court rendered its decision on a theory of "collateral participants," or (b) such a decision is in conflict with any prior decision.

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5 *E.g.*, "Direct Violations," "Aiding and Abetting," "Conspiracy." Pet. Br. p. 12.

The circuit court's opinion recited Gordon's allegations and affidavits which pertained specifically to FNBPB, and concluded that Gordon claimed that the Bank: (1) had confidence in Green's experience; (2) assured Gordon his investments were in good hands; (3) claimed to be skilled in its occupation; and (4) agreed to manage the syndication. *Id.* at 743. Thus, Gordon's implication that FNBPB could be a "collateral participant" in the "Green dependency" is ludicrous. There are no allegations in the many complaints, and no indications in the circuit court's opinion, to the effect that FNBPB "aided and abetted" (or "violated" or "conspired") in a scenario whereby Gordon became so dependent on Green, the FNBPB, or others, that he was either incapable or unable to exercise his 40 percent control in the Magnolia Ranch trust. Gordon has not even now suggested a mechanism whereby these acts and statements by FNBPB precluded his exercising his 40 percent interest in the Magnolia Ranch venture.

Rather than fulfill his task of pointing out conflict, Gordon has merely made an effort to reargue his case on a basis not presented below. Such does not constitute the special and important reasons why this Court should exercise its conflict jurisdiction, and entertain Gordon's petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN F. RUDY, II of
BUSH, ROSS, GARDNER,
WARREN & RUDY
101 South Franklin Street
Tampa, Florida 33602
(813) 224-9255

Attorneys for Respondent
FIRST NATIONAL BANK
IN PALM BEACH

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, pursuant to Rule 28.3., Revised Rules of the United States Supreme Court, three (3) copies of this brief were served upon each counsel of record, by depositing the same in a United States Post Office, with first-class postage prepaid, at the addresses shown below, on this 20th day of December, 1982.

BUSH, ROSS, GARDNER,
WARREN & RUDY
101 South Franklin Street
Tampa, Florida 33602
(813) 224-9255

Attorneys for Respondent
FIRST NATIONAL BANK
IN PALM BEACH

By: JOHN F. RUDY, II

Mr. Daniel I. MacIntyre
MacIntyre, Weyant, Clarke & Reuss
1750 Peachtree Street N.W.
Suite 275
Atlanta, Georgia 30309
Attorney for Edwin F. Gordon

Mr. G. Thomas Ball
Baker & Hostetler
850 CNA Tower
P.O. Box 112
Orlando, Florida 32802
Attorney for G. A. Terry, Sr.,
Mary Terry, Netsy B. Terry
and George Terry, Jr.

Mr. Peter D. Webster
Bedell, Bedell, Dittmar & Zehmer
1500 Barnett Bank Building
Jacksonville, Florida 32202
Co-Counsel for Gustave T. Broberg, Jr.

Mr. William A. Gillen
Mr. John McQuigg
Fowler, White, Gillen, Boggs,
Villareal & Banker, P.A.
P.O. Box 1438
Tampa, Florida 33601
Co-Counsel for Gustave T. Broberg, Jr.

Mr. Paul B. Erickson
Mr. Michael J. Pucillo
Alley, Maass, Rogers, Lindsay
& Chauncey
321 Royal Poinciana Plaza
Palm Beach, Florida 33480
Attorneys for T. R. Anderson
and Robert D. Lacey

Mr. Sidney A. Stubbs, Jr.
Jones & Foster, P.A.
601 Flagler Drive Court
P.O. Drawer E
West Palm Beach, Florida 33402
Attorney for E. G. Green and
Hemingway Co.

Mr. Earl D. Waldin, Jr.
Smathers & Thompson
131 Alfred I. DuPont Building
Miami, Florida 33131
Attorneys for Alice M. Rhoades,
Harold H. Heye, Pierre V.
Heftler, Virgil Sherrill,
Samuel R. Sutphin, William L.
Rudkin, George Coleman,
Henry A. Rudkin, Jr., and
Dudley V. Sutphin

Mr. P. Lee Bennett
P.O. Box 3309
Orlando, Florida 32802
Attorney for Estate of M. M.
Overstreet, Jeanette Overstreet,
Jennings L. Overstreet and
Joann Overstreet

Mr. Michael J. Cappucio
City National Bank Building
25th West Flagler Street
Miami, Florida 33130